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Supreme Court, U.S.
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No. 05-586

IN THE

Supreme Court of the United States

PLACER COUNTY; TRACY GRANT; RON GOODFASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFREY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; REED, OFFICER,
Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO,
Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER ALL TRUTHFUL ASSERTIONS WITHIN AN AFFIDAVIT WHEN CONSTRUING THE SUFFICIENCY OF PROBABLE CAUSE ASSERTED TO SUPPORT A SEARCH WARRANT.

2. WHETHER THE NINTH CIRCUIT GRANTED UNWARRANTED DEFERENCE TO THE WHITE-COLLAR NATURE OF THE PUBLICLY REPRESENTED OCCUPATION OF A SUSPECTED NARCOTICS TRAFFICKER IN FINDING A FOURTH AMENDMENT VIOLATION BASED ON THE FORCE BRIEFLY EMPLOYED TO DETAIN THE SUSPECT DURING THE EXECUTION OF A SEARCH WARRANT.

3. WHETHER POTTER'S CONDUCT DURING THE COURSE OF A SERACH OF A SUSPECTED DRUG TRAFFICKER'S HOME VIOLATED "CLEARLY ESTABLISHED" LAW WARRANTING THE DENIAL OF HIS RIGHT TO QUALIFIED IMMUNITY.

PARTIES TO THE PROCEEDINGS

Petitioner

Jeffrey Potter, Auburn, California,

Respondents

Georgia Chacko and Michael Baldwin, Carmichael, California.

The following parties named in the caption of the underlying action have not petitioned for review: Placer County, Placer County Sheriff's Department, Brian Whigam, Kevin Besana, Ron Goodpaster, Stephen L. D'Arcy and Tracy Grant.

Officer Reed has filed a separate petition for review.

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David P. Mastagni and David E. Mastagni on behalf of Jeffrey Potter, petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the Ninth Circuit Court of Appeals is reported at 418 F.3d 966. App., *infra*, A. The

superseded opinion of the Ninth Circuit Court of Appeals is reported at 405 F.3d 778. App., *infra*, B. The opinions of the district court, No. 04-15848, D. C. No. CV-01-01177-MCE are unreported. App., *infra*, C.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 2005. App., *infra,* B. This judgment was amended on August 8, 2005. App., *infra,* A. A petition for rehearing was denied on August 8, 2005 and the court of appeals stated it would not entertain any new petitions. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. Amend. IV.

STATEMENT

1. On September 22, 1998, Placer County Sheriff's Deputy Jeffrey Potter, a member of the Placer County Marijuana Eradication Team (MET), obtained a search warrant for the Loomis, California home of Respondents, Michael Baldwin and Georgia Chacko ("Baldwins"). The following morning, members of the MET entered the residence of Respondents to execute the search warrant.

Deputy Potter entered the master bedroom after repeatedly nudging Chacko in her throat with his fingers to move her out of the doorway.[1] Chacko alleges Potter placed a gun to the back of her head immediately following his entry into the bedroom and before handcuffing her.[2] She suffered no physical injury.

The MET unit seized 147 marijuana plants from the house. Respondents brought excessive force and judicial deception claims following their arrest.

It is undisputed that on September 16, 1998, Deputy Potter found .08 grams of dried and partially burned marijuana leaves, marijuana stems, some planting pots, and a "lava rock" during the serach of Respondents' garbage outside their home. Deputy Potter relying on his experience and training believed the Baldwins were using these "lava rocks" as a growing medium for the cultivation of marijuana.

The Baldwins claim Deputy Potter lied in his affidavit in support of the search warrant, in asserting he found "fresh, green and still moist marijuana stems and leaves recently cut from a mature marijuana plant," a "grow rock," and "pots."

Deputy Potter also relied on and incorporated the statement of a confidential citizen informant to support his request for a search warrant. The informant personally knew Placer County Deputy Sheriff, Deputy Reed. The informant's sealed statement identified Baldwin by his name and other profession (a dentist), provided specific articulable facts demonstrating likely marijuana cultivation by Michael

[1] Petitioners Placer County, Tracy Grant, Ron Goodpaster, Brian Wiggam, Kevin Besana, Stephen L. D'arcy, Jeffrey Potter, Placer County Sheriff's Department, and Officer Reed accepted these allegations as true for purposes of appeal.

[2] Michael Baldwin brought an excessive force claim against Deputy Reed during the same search.

Baldwin, and included the basis for the informant's assertions.

2. Respondents filed their First Amended Complaint on October 12, 2001, alleging a 42 U.S.C. § 1983 claim based upon the alleged Fourth Amendment violations against Jeff Potter, Tracy Grant, Ron Goodpaster, Mark Reed and Kevin Besana. In addition the Baldwins alleged false arrest, assault, battery, defamation, RICO violations, excessive force/unreasonable seizure, judicial deception, conspiracy to commit judicial deception, a due process claim and a *Monell*[3] claim asserting that Placer County had a practice, policy and custom of similar Fourth Amendment violations. Due to the 42 U.S.C. § 1983 claims, the United States District Court was conferred jurisdiction over Respondents claim pursuant to 42 U.S.C. § 1343(3).

On May 20, 2003, Petitioners[4] moved for summary judgment as to all claims based on Respondents failure to respond to any written discovery. Respondents provided discovery responses before the hearing, and the motion was denied in part, but granted as to the defamation claim against Steven L. D'Arcy, the Undersheriff of Placer County.

After deposing Chacko and Baldwin, Petitioners, including Potter, filed a motion for summary judgment on December 7, 2003. The District Court heard the motion on January 26, 2004. Following that hearing, the District Court took the motion under submission until issuing its Order on April 2, 2004. App., *infra*, C.

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[3] *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 658 (1978)

[4] Petitioners refers to Jeffrey Potter , Placer County, Tracy Grant, Ron Goodpaster, Brian Wiggam, Kevin Besana, Stephen L. D'Arcy, Placer County Sheriff's Department, and Officer Reed.

The District Court's April 2, 2004, Order, granting in part and denying in part Petitioners' motion for summary judgment, took note of Respondents' abandonment of their RICO, false arrest, and false imprisonment claims, in addition to their claims for equitable relief. App., *infra,* 21a. The Court granted summary judgment in favor of Petitioners as to Respondents' "defamation plus" claim under Section 1983 against D'Arcy; their due process claim against Brian Whigam, alleging perjured testimony at a preliminary hearing leading to their criminal prosecution; their excessive force and assault claims against all officers other than Reed and Potter; and Chacko's excessive force/unreasonable seizure claim against Potter for allegedly ogling her in her bedclothes. App., *infra,* 24a-26a.

The District Court denied summary judgment as to the Baldwins' excessive force claims arising from the allegations of excessive force relative to the momentarily placement of a gun to their heads prior to being handcuffed; Chacko's excessive force claim relative to being poked in her throat by Potter; the judicial deception claim; the conspiracy to commit judicial deception claim; and the *Monell* claim. App., *infra,* 22a-23a.

3. Petitioners, Jeff Potter, Mark Reed, Ron Goodpaster, Kevin Besana, Tracy Grant, the County of Placer and the Placer County Sheriff's Department filed an interlocutory appeal on April 28, 2004. For purposes of the appeal only, the Petitioners accepted Respondents' allegations as true to obtain a ruling before trial on the legal viability of the claims alleging excessive force and judicial deception in violation of Respondents' Fourth Amendment rights.

The first opinion of the Ninth Circuit Court was issued April 19, 2005. *Baldwin* v. *County of Placer*, 405 F.3d 778 (9th Cir. 2005), *opinion amended and superseded on denial of rehearing by* 418 F.3d 966 (9th Cir. 2005); App.,

infra, B. The panel held the Petitioners violated established Constitutional rights through use of excessive force and accordingly found that qualified immunity was appropriately denied. App., *infra,* 14a. The panel also held that absent the false information in the search warrant probable cause did not exist. App., *infra,* 14a-15a.

On May 3, 2005, Petitioners sought rehearing or rehearing en banc based on the court's failure to apply material points of law and fact and failure to follow relevant United States Supreme Court decisions. On August 8, 2005, the panel amended its opinion in light of the recent decision issued by this Court, but also affirmed its prior decision and denied the petition for rehearing. The panel declared it would not entertain any new petitions. *Baldwin* v. *County of Placer*, 418 F.3d 966 (9th Cir. 2005); App. *infra*, A.

4. In *Baldwin* v. *County of Placer*, *supra*, 418 F.3d 966, the court held (1) no exigency existed to justify the use of even minimal force when there was no pre-entry evidence suggesting the dentist-homeowner and his wife (Chacko) would resist, flee, or be armed; (2) after "Potter's lies" are redacted from the affidavit in support of the search warrant, the warrant was lacking in probable cause; and (3) Petitioner was not entitled to qualified immunity because the law at the time of the search "clearly established" that his conduct involving the search of the home violated Respondents' constitutional rights. *Id.* at 970-971; App., *infra,* 7a-9a.

With respect to the first issue of alleged excessive force, the panel provided no legal basis, in holding "a reasonable officer" would know that nudging Georgia Chacko in the throat to move her from a doorway was excessive. *Baldwin,* 418 F.3d at 970, citing *Brosseau* v. *Haugen,* 125 S. Ct. 596, 599 (2004); App., *infra,* 7a. The panel declared Deputy Potter should have been aware the Ninth Circuit has previously established the "right" of a

citizen "to be free from battery by gun-wielding officers." *Baldwin,* 418 F.3d at 970, citing *McKenzie* v. *Lamb,* 738 F.3d 1005, 1010 (9th Cir. 1984); App., *infra,* 6a.

The panel departed from this court's existing precedent by finding that during the entry of the home of a "practicing dentist and his wife" while unaware of whether they are armed, any use of force is excessive. 418 F.3d at 970; App., *infra,* 7a-8a.

On the second issue, Respondents' judicial deception claim, the panel redacted all references to marijuana from the warrant affidavit, including implying that Potter's assertion at finding marijuana during the garbage search was untruthful. *Baldwin,* 418 F.3d at 970-971; App., *infra,* 8a. The panel then held that absent any references to marijuana, the remainder of the affidavit merely attests to an "unidentified citizen at an unidentified date telling a sheriff's deputy of marijuana growing at an unidentified time; also the presence of a rock and two pots, the uses of which are ambiguous." *Baldwin,* 418 F.3d at 970; App., *infra,* 8a. The panel declared the false statements in the affidavit could not be "bleached" from "the mind of the magistrate" and rejected the County's argument "objective circumstances" justified issuance of the warrant. *Baldwin,* 418 F.3d at 970; App., *infra,* 8a-9a.

Finally, that the panel erroneously denied qualified immunity to Petitioner because "the law [of the Ninth Circuit] at the time of the search clearly established that the officer's conduct could violate the constitution." *Baldwin,* 418 F.3d at 970; App., *infra,* 7a. The panel failed to reconcile its opinion with the *Brosseau* decision, or even its own precedent in *Robinson.*

REASONS FOR GRANTING THE PETITION

This petition for writ of certiorari is brought because the August 8, 2005, opinion of the Ninth Circuit Court of Appeals presents a fundamental departure from the controlling decisions of this Court in Fourth Amendment cases involving alleged judicial deception and excessive force. The panel declined to follow *Franks* v. *Delaware* by redacting truthful statements from a search warrant affidavit to support a determination that the redacted affidavit was insufficient to support probable cause. 438 U.S. 154 (1978). The published opinion presents an impermissible attempt by the Ninth Circuit to create a "per se" rule barring law enforcement officers from using force to detain and secure suspected drug traffickers when executing a search warrant on their residence due to the class-based assumptions that a white-collar suspect (a dentist) poses no threat to flee, fight or destroy evidence. Finally, the opinion also conflicts with precedent in this Court and other Circuits in holding that a general "right" equates to "clearly established" law under *Brosseau* v. *Haugen.* 543 U.S. 194, 125 S. Ct. 596 (2004).

1. THE NINTH CIRCUIT'S FAILURE TO CONSIDER ALL THE TRUTHFUL STATEMENTS IN POTTER'S AFFIDAVIT CONFLICTS WITH THE PRECEDENT SET FORTH IN *FRANKS* V. *DELAWARE.*

Pursuant to *Franks* v. *Delaware,* a previously executed search warrant based upon an affidavit containing willfully or recklessly made false statements is still valid where the remaining facts contained in the affidavit amount to probable cause. 438 U.S. at 171-172. The *Baldwin* panel did not follow this precedent and failed to consider the facts in the affidavit deemed to be truthful and accurate.

Here, the panel determined that Deputy Potters' search affidavit included several false statements. One of the key statements at issue in the affidavit was Potter's statement that he had found "fresh, green and still moist marijuana stems and leaves recently cut from a mature marijuana plaint." *Baldwin*, 418 F.3d at 968. The panel determined and both parties stipulated for purposes of the appeal only that Potter had in fact found dried and partially burned marijuana leaves and marijuana stems.

Franks only requires that the "material that is the subject of the alleged falsity or reckless disregard is set to one side." 438 U.S. at 171-172. The panel impermissibly redacted and excluded any reference to marijuana found in the garbage. It is undisputed that Potter had in fact found marijuana leaves and stems and therefore these facts should not be redacted from the affidavit. Accordingly, the panel should have only redacted the references to "fresh, green and still moist...recently cut from a mature marijuana plant."

The panel impermissibly redacted facts from the affidavit that should have been considered true in the affidavit for purposes of determining probable cause. The exclusionary rule is based on the policy determination that "while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied." *Murray* v. *U.S.*, 487 U.S. 533, 542 (1988). Here, the panel overstepped its authority by redacting truthful accurate facts in violation of *Franks*.

A. Absent the Impermissible Redaction of References to Found Marijuana, Probable Cause Would have Been Established Meriting the Issuance of the Search Warrant.

If the panel had not redacted all references to the discovery of marijuana in the garbage, probable cause would

have been established for the warrant. The requisite facts necessary to establish probable cause for the issuance of a search warrant occurs where the identified facts would lead a reasonable person to conclude there is a fair probability that contraband will be found in a particular place. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). As a matter of law, the discovery of marijuana in the garbage, without more, establishes probable cause.

In the present case, the undisputed facts alleged in the warrant application established probable cause, irrespective of the false information contained in the affidavit. Although the panel's opinion characterizes the marijuana discovery by Potter during the trash search as "virtually unrecognizable" marijuana, the Respondents concede that marijuana was in fact found in the garbage. *Baldwin,* 418 F.3d at 970.

In addition to the discovered marijuana, the panel also acknowledged that Potter's statements in the affidavit referencing the confidential informant's statement, the discovery of narcotics paraphernalia, and discovery of the lava/grow rock and pots was truthful.

The Courts have found probable cause for the issuance of a search warrant based on the discovery of marijuana, in the trash, the discovery of grow paraphernalia, and information from a confidential informant. See *U.S.* v. *Greany*, 929 F.2d 523, 525 (9th Cir. 1991); *U.S.* v. *Briscoe*, 317 F.3d 906, 907-908 (8th Cir. 2003); *U.S.* v. *Celestine*, 324 F.3d 1095, 1102 (9th Cir. 2002). In *Celestine*, the Ninth Circuit held, marijuana in the trash, evidence of hydroponic culture and evidence linking the residence to other suspected marijuana growers sufficed to establish probable cause. 324 F.3d at 1102. In *Briscoe*, the discovery of marijuana seeds and stems was sufficient "stand-alone" evidence for probable cause to search a home for suspected possession of marijuana. 317 F.3d at 907-908.

In accordance with *Celestine* and *Briscoe*, the remaining truthful assertions in Potter's affidavit more than suffice to establish probable cause to search the Baldwin residence for cultivation or possession of marijuana. When the affidavit is read to include only truthful assertions and probable cause still exists, then the warrant must be deemed valid and the evidence seized pursuant to the warrant should not be suppressed. *U.S.* v. *Sims*, 845 F.2d 1564, 1571 (11th Cir. 1988).

The Ninth Circuit's redaction of truthful statements from the affidavit deviates from this Court's holding in *Franks*. *Franks* requires only the redaction of facts determined to be recklessly or willfully untruthful. 438 U.S. at 171. Furthermore, *Franks* expressly requires that once the untruthful statements are redacted, the remainder of the affidavit must be examined to determine whether probable cause exists. Here, the panel completely redacted any reference to the discovery of marijuana despite the fact that the respondents conceded that some marijuana stems and leaves were found. The panels' decision to redact truthful statements goes beyond the "limited scope" of *Franks*. Absent this impermissible action, probable cause would have been found.

2. THE NINTH CIRCUIT GRANTED UNWARRANTED DEFERENCE TO THE WHITE-COLLAR NATURE OF THE PUBLICLY REPRESENTED OCCUPATION OF A SUSPECTED NARCOTICS TRAFFICKER IN FINDING A FOURTH AMENDMENT VIOLATION BASED ON THE FORCE BRIEFLY EMPLOYED TO DETAIN THE SUSPECT DURING THE EXECUTION OF A SEARCH WARRANT.

Review is necessary to correct the Ninth Circuit's abandonment of the *Michigan* v. *Summers*, 452 U.S. 692 (1981) standard requiring the consideration of "totality of the circumstances" in assessing excessive force claims, and establishment of a new class-based rule wherein the *occupation of the homeowner* determines whether officers may use force to detain suspects during the execution of a search warrant. The Ninth Circuit's standard narrowly focuses on the "white-collar" veneer of the suspected narcotics traffickers' "legitimate" occupation, departing from controlling precedent recognizing the inherent dangers in searching drug dens and requiring assessment of all the circumstances from the view point of a reasonable officer on scene.

The Ninth Circuit describes its occupational deference test as follows:

> Baldwin was a practicing dentist. Nothing in the record indicates that the officers had reason to believe that he would resist or flee. ... [G]overnmental interests are at a minimum when the searchers assert no belief that weapons will be found and no belief other than that the occupants of the house are a practicing dentist and his wife. *Baldwin*, 418 F.3d at 970.

The Ninth Circuit's standard of occupational deference fundamentally departs from this Court's precedent in *Summers*. In *Summers*, this Court recognized the right of officers to detain drug suspects during a search and required careful consideration of all circumstances, including nature of the suspected criminal activity, the safety of the officers, and law enforcement interests in preventing flight, when assessing a Fourth Amendment claim. *Summers*, 452 U.S. at 702-5 692.

"[A] warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705.[5] In considering the law enforcement interests at issue, *Summers* authorized detentions during a narcotics search on a record devoid of particularized threats from the suspects. *Summers* stated the controlling standard for measuring the police conduct as follows:

> In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant, both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers. *Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence.* The risk of harm to both the police and the occupants is minimized if the

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[5] The Court in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587 (1981), presumed a lawful search warrant preceded the entry into the home; that is, the lawfulness of the warrant was not an issue in determining whether officers are entitled to use any force to detain a homeowner during a search for contraband. The lower court in this case likewise did not relate the use of force to the lawfulness of the warrant, instead declaring no use of force at all was appropriate. *Baldwin v. County of Placer*, 418 F.3d 966, 970 (9th Cir. 2005).

> officers routinely exercise unquestioned command of the situation. *Summers*, 452 U.S. at 702-703, citing 2 W. LaFave, Search and Seizure § 4.9, pp. 150-151 (1978). (Emphasis Added).

Regardless of legitimate, secondary employment, suspected drug traffickers are unpredictable and pose a significant threat to run, fight, or destroy evidence, and therefore the search of a drug den pose inherent danger to the officers. As this Court recognized in *Summers*, the officers may assert command of the premises subject to a drug search, without articulating every threat posed. Moreover, "[i]nherent in *Summers'* authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." *Muehler* v. *Mena*, 125 S. Ct. 1465, 1470 (2005).

Furthermore, the *Baldwin* opinion also conflicts with *Graham* v. *Connor*, 490 U.S. 386 (1986). *Graham* requires the "reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* at 396-397. Nevertheless, with the luxury of hindsight the Ninth Circuit essentially holds the nature of a suspect's non-criminal occupation supersedes the determination of "objectively reasonable officers ... that the exigency of the entry justified the batteries on the plaintiffs." *Baldwin*, 418 F.3d 970. The opinion refuses to consider Petitioner's conduct from the perspective of a reasonable officer on the scene or in light of the legitimate law enforcement interests in "exercising unquestioned command of the situation." *Summers*, 452 U.S. at 702-703.

Unless corrected, this published opinion will have serious and far-reaching adverse consequences on the safety of law enforcement officers during drug searches and

community efforts to eradicate narcotics trafficking. The opinion creates a Constitutionally impermissible and functionally unworkable standard wherein the Ninth Circuit affords wealthy "white-collar" drug dealers greater Fourth Amendment protections than other citizens and law enforcement officers must abdicate their authority to exercise command during the entry of such "white-collar" suspects' residences. This precedent undermines the ability of law enforcement officers and agencies to safely combat narcotics distribution and cultivation by creating a presumption that suspects with "white collar" cover occupations pose no threat to law enforcement interests. Finally, review is necessary to restore the proper analysis of Fourth Amendment claims to the viewpoint of a reasonable officer on-scene, considering the totality of the circumstances.

3. POTTER'S CONDUCT DURING THE COURSE OF THE SEARCH OF THE RESPONDENTS' HOME DID NOT VIOLATE CLEARLY ESTABLISHED LAW AND THEREFORE THE NINTH CIRCUIT ERRED IN DENYING HIM QUALIFIED IMMUNITY.

Even if the conduct at issue was excessive, the Ninth Circuit erred in denying Potter qualified immunity, because no clearly established law existed placing him on notice that nudging a drug suspect with his fingers and placing his gun on the suspect's head violated the Fourth Amendment. The court's reliance on *McKenzie*, 738 F.2d at 1010, in asserting that since 1984 Ninth Circuit precedent clearly established Respondents possessed a right to be "free from battery from gun wielding officers," is wholly misplaced. 418 F.3d at 970. In *Brosseau* v. *Haugen*, 125 S. Ct. at 599 (2004) and *Saucier* v. *Katz*, 533 U.S. 194, 206 (2001) this Court has already reversed the Ninth Circuit for applying the clearly established law standard at too abstract a level of generality to inform officers their conduct was unlawful. *Baldwin*

commits the same error in construing *McKenzie* at too high a level of generality to have reasonably informed Potter his conduct violated the Fourth Amendment.

The opinion subverts this Court's precedent requiring a showing that the officer was on notice his conduct was unlawful. *Brosseau*, 125 S. Ct. at 599. The doctrine of qualified immunity "shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Ibid.* Under this standard, an officer will only be stripped of qualified immunity where a showing is made that the officer was on notice that his conduct was unlawful. *Ibid.* Notice of unlawfulness requires the law be clearly established so that a reasonable officer would understand his actions are in violation of the Fourth Amendment. *Ibid*, citing *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Qualified immunity will not be denied "if the law at the time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability, or, indeed even the burdens of litigation." *Brosseau*, 125 S. Ct. at 599.

No existing precedent provided notice to Deputy Potter that briefly touching the back of an un-handcuffed suspect's head with a gun and nudging the suspect's neck with his fingers during the execution of search warrant for narcotics constituted excessive force. The Ninth Circuit's reliance on *McKenzie* in finding Potter was on notice that his conduct was unlawful is unavailing. *McKenzie*, *supra*, 738 F.2d 1005. Because the factual circumstances in *McKenzie* are so distinct, the Ninth Circuit could only glean the overly broad holding that "individuals have a right to be 'free from battery from gun wielding officers.'" *Baldwin*, 418 F.3d at 970. In continuing to apply the principle of qualified immunity incorrectly, the Ninth Circuit generalized *McKenzie* to the point that its holding easily could be used to

deny any armed officer qualified immunity from any battery claim, thus defeating the notice requirement of *Brosseau.*

The facts in *McKenzie* are as follows:

> Appellants . . . offered evidence that the defendant plain-clothes officers, some dressed as bellhops and busboys, burst into the hotel room with weapons drawn, forced appellants against the wall, handcuffed them, and threw them to the floor. The defendants, according to appellants, then pressed the barrels of their guns against appellants' heads and refused to identify themselves as police officers, in spite of repeated requests and pleas. When finally told that the assailants were police officers, Herndon asked to see official identification. He alleges, in testimony corroborated by Michael Hazelton, that an officer pressed the barrel of a gun between his eyes and replied, "that's about all [the identification] you need."
>
> The appellants asked why they were being treated so roughly; the gist of the officers' alleged reply was: You are in Las Vegas, Nevada, and we do things the way we please out here. *McKenzie* v. *Lamb*, 738 F.2d at 1010-1011.

The *McKenzie* court would have found the conduct unlawful even had the officers not pointed their weapons at the suspects heads. *See, Robinson* v. *County of Solano*, 278 F.3d 1007, 1017 (Fernandez, *concurring*), (9th Cir. 2002). *McKenzie* provided Potter no notice as to the legality of his conduct, because the underlying conduct is so dissimilar. In *Baldwin*, the officers were entering the home of a subject who is suspected of cultivating and/or possessing marijuana.

Upon entering the premises, the officers were unaware of how many suspects were present and did not know whether weapons were in the house. The officers had an absolute right to secure the house and the suspects inside to protect themselves from harm. In *Mckenzie*, the officer pointed his gun at the head of the suspect after having handcuffed the suspect and before identifying himself as a police officer. 738 F.2d at 1011. In *Baldwin*, Potter was clearly identifiable as a peace officer and he only wielded his firearm prior to handcuffing the respondent and prior to securing the scene.

Until 2002, the Ninth Circuit did not clearly establish that pointing a gun at point blank range at the head of a non-threatening suspect who posed no immediate risk to the safety of the officers constituted excessive force. *Robinson* v. *Solano County*, 278 F.3d at 1015-16 *overruling Fuller* v. *Vines*, 36 F.3d 65 (9th Cir. 1994). In *Robinson* v. *Solano County*, 278 F.3d 1007, 1015-1016 (9th Cir. 2002), the Court, relying in part on *McKenzie*, concluded that pointing a gun at the head of a unarmed subject suspected of committing a misdemeanor and who posed no immediate risk to the safety of the officers constituted excessive force. No factors justified use of a gun, as the suspect being apprehended was suspected of committing a misdemeanor, the suspect was unarmed, and the officers were approaching the suspect in a peaceful manner. 278 F.3d at 1014. No dangerous or exigent circumstances existed and the officers outnumbered the plaintiff. *Ibid.*

The *Robinson* court determined the force used was excessive and unlawful. However, the court refused to strip the officers of qualified immunity because their decision overruled conflicting case law established in *Fuller* v. *Vines*. 278 F.3d at 1013. The *Robinson* court acknowledged that *Fuller* suggests that pointing a gun at a suspect is never excessive force. 278 F.3d at 1013. Accordingly, the officers in *Robinson* were entitled to qualified immunity since they

were not on notice that their conduct was clearly unlawful. *Id.* at 1013-1014.

Analogous to *Robinson*, Potter is entitled to qualified immunity because there was no clear notice that his conduct was unlawful. As noted in *Robinson*, no authorities in 2002 clearly established that pointing a gun at point blank range at the head of an unarmed person suspected of committing a misdemeanor constituted excessive force. In fact, Potter could justify his conduct in reliance on *Fuller* which implied that officers always had a right to point a gun at a suspect.

The difference between touching a person's head with a weapon as alleged in *Baldwin,* and pointing a weapon at the head of a suspect as occurred in *Robinson* is de minimus. There was no clearly established law in 1998 that found such force to be excessive. Therefore, Potter was not on fair notice that his actions constituted excessive force. Accordingly, he is entitled to qualified immunity.

Moreover, other Circuits did not hold Potter's actions constituted excessive force. In *Sharrar* v. *Felsing*, twenty armed officers, including a SWAT team armed with machine guns, apprehended four men, after a domestic assault. 128 F.3d 810, 821 (3rd Cir. 1997). While surrounded by twenty officers with weapons fixed on the suspects' heads, the suspects were forced to lay face down in the dirt while being verbally threatened. *Ibid.* An officer lifted one suspect by his handcuffs causing his shoulder to come partially out of its socket. *Ibid* The other suspects were humiliated, emotionally distressed and felt publicly scorned. *Ibid.* These actions did not extend beyond the necessary time to secure the suspects. *Ibid.* Based upon these facts, the Third Circuit found the officers' actions were extreme, but not excessive.

In the Tenth Circuit, a SWAT team was used to carry out a misdemeanor warrant on a suspect who had no prior

criminal history. *Holland ex rel. Overdorff* v. *Harrington*, 268 F.3d 1179, 1191 (10th Cir. 2001). The deputies detained every person on the property, including children, at gunpoint, forcing them to lie on the ground for ten to fifteen minutes. *Id.* at 1192. The deputies' actions constituted excessive force because the officers continued to hold the children at gunpoint after the officers attained control of the situation, and thereby violated the children's Fourth Amendment rights. *Ibid.* However, the Court did not find the same use of force against the adults excessive. *Ibid.* Thus, *Holland* supports Potter's belief that pointing a weapon at an unarmed adult to carry out a misdemeanor warrant does not constitute excessive force.

When determining entitlement to qualified immunity "[i]t is important to emphasize that this inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau*, 125 S. Ct. at 599 citing *Saucier*, 533 U.S. at 201. "The general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness" does not satisfy the clearly established law requirement. *Ibid.* The doctrine of qualified immunity has historically been defined broadly. The defense "provides ample protection to all but the plainly incompetent or those who knowingly violate the law . . . . [I]f officers of reasonable competence would disagree on th[e] issue [whether or not a specific action was constitutional], immunity should be recognized." *Anderson*, 483 U.S. at 640.

Similarly, the panel's reliance on the *McKenzie* opinion is misplaced as *McKenzie* can provide no better notice to appellants for their alleged conduct in this case than it provided to the officers in *Robinson*. No authorities in 1998 clearly established that pointing a weapon at the head of a suspect or touching the head of a suspect with a gun constitutes excessive force. *Baldwin* merely cites the broadest

holding of *McKenzie* finding Potter's conduct violated "clearly established" law. *Baldwin,* 418 F.3d at 970. *McKenzie* states a general proposition that citizens should be free from battery by gun yielding officers. 738 F.2d at 1010. *McKenzie* provides no guidance as to what, if any, force constitutes battery, nor does it provide any guidance as to what circumstances justify pointing a gun at the head of a suspect. *McKenzie* is insufficient as a matter of law to support the *Baldwin* court's finding that Potter was on fair notice his actions were unconstitutional. 418 F.3d at 970, citing *Brosseau,* 125 S. Ct. at 599. Under the panel's rationale, any time an officer's gun touched a citizen within the Ninth Circuit the action would constitute excessive force. Therefore, under *Brosseau,* Potter should not have been denied qualified immunity.

Further, no precedent clearly established Potter's actions in nudging Chacko's neck to gain access to the master bedroom, in a manner which caused her minor discomfort, constituted excessive force. The Ninth Circuit held "Potter's fingers at the throat of Baldwin's wife constitute a separate battery that a reasonable officer would know was excessive", but was unable to provide the clearly established law supporting its conclusion. *Baldwin,* 418 F.3d at 970. Under *Graham*'s reasonable officer standard, Potter has legitimate reason to believe his nudging of Chacko was lawful.

"Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment." *Graham, supra,* 490 U.S. 386, 396-397. As *Summers, supra,* recognized, "execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." 452 U.S. at 702-703, citing 2 W. LaFave, at 150-151 (1978). "Inherent in *Summers'* authorization to detain an occupant of the place to be

searched is the authority to use reasonable force to effectuate the detention." *Muehler,* 125 S. Ct. at 1470. "Qualified immunity operates . . . to protect officers from the sometimes 'hazy border between excessive and acceptable force,' *Priester* v. *Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000), and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier*, *supra*, 533 U.S. at 206.

Because no clearly established law would have notified Potter his prodding of the suspect was unlawful, the Ninth Circuit erred in denying him qualified immunity. The Ninth Circuit has again improperly relied upon over generalized holdings to justify denying Potter qualified immunity. Review must be granted to ensure the Ninth Circuit conforms to the requirements of this Court in *Brosseau* when denying qualified immunity.

CONCLUSION

For the foregoing reasons, Petitioner Jeffrey Potter respectfully requests this Court grant the petition and issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

DAVID P. MASTAGNI
Lead Counsel for Petitioner Potter

DAVID E. MASTAGNI
Counsel for Petitioner Potter

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL W. BALDWIN, DDS
GEORGIA CHACKO,
Plaintiffs-Appellees,
v.

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFREY POTTER: PLACER COUNTY SHERIFF'S DEPARTMENT; REED, OFFICER,
Defendants-Appellants.

No. 04-15848
D.C. No.
CV-01-01177-MCE
ORDER AND
AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted
March 18, 2005—San Francisco, California

Filed April 19, 2005
Amended August 8, 2005

Before: John T. Noonan, Sidney R. Thomas, and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Noonan

COUNSEL

David K. Huskey, Auburn, CA, for the defendants-appellants.

J. David Nick and Paul R. Turley, San Francisco and Oakland, CA, for the plaintiffs-appellees.

Kate Wells, Santa Cruz, CA, for plaintiff-appellee, Georgia Chacko.

ORDER

The opinion filed on April 19, 2005 is amended as follows:

At slip op. p. 4410, l. 3-4, change sentence to read: "On the conceded facts before us, whatever exigency existed was insufficient to justify the batteries."

At slip op. p. 4410, at the end of the first paragraph ending "a practicing dentist and his wife.", add "We conclude that 'the law at th[e] time [of the search] ... clearly establish[ed] that the officer's conduct could violate the Constitution.' *Brosseau v. Haugen,* --- U.S. ----, ----, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004)."

At slip op. p. 4411, at the end of the second paragraph ending "bleached out.", add a new paragraph.

> The County invokes a fundamental case on the Fourth Amendment, *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *Franks* does permit a court to purge the false statements and to sustain the warrant if the unpurged residue would justify it. But what will sustain the warrant must already be

within it. The County is pointing to evidence not cited in the warrant. That evidence cannot sustain the warrant. *See United States v. Davis*, 714 F.2d 896, 899 (9th Cir.1983) (under *Franks*, "[t]he fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error.").

With this amendment, the panel has voted to deny the petition for rehearing. Judges Thomas and Fisher have voted to deny the petition for rehearing en banc and Judge Noonan has so recommended.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

The panel will not entertain any new petitions for rehearing or petitions for rehearing en banc.

OPINION

NOONAN , Circuit Judge:

Placer County and several of its police officers (collectively, the County) have taken this interlocutory appeal from the district court's denial of their motion for qualified immunity in this 42 U.S.C. § 1983 action brought by Michael Baldwin and Georgia Chacko (the plaintiffs). On the basis of the facts conceded as undisputed by the County for purposes of this appeal, we hold that the County violated established constitutional rights of the plaintiffs and that qualified immunity was properly denied.

FACTS

On September 22, 1998, Jeff Potter, an officer of the marijuana eradication team (MET) of the County's Sheriff Department, applied for a search warrant for the residence of Michael Baldwin and Georgia Chacko, then Baldwin's wife. The affidavit stated that on July 16, 1998, Deputy Mark Reed had told Sergeant Kevin Besana that "a citizen informant" had told him that Michael Baldwin, a dentist, was "possibly growing marijuana." The date when this information was given and the date when Baldwin was possibly growing marijuana were not stated in the affidavit. Potter stated that Besana had passed this tip to him and that four days after receiving it, he confirmed Baldwin's office address as a dentist and obtained the registration number of his car; Potter used the car registration to confirm the informant's statement as to Baldwin's home address. A check of DMV records showed Baldwin to be 35 years-old, 5' 9", weighing 165 pounds and Georgia Chacko to be 34 years-old, 5' 5", weighing 125 pounds.

On September 16, 1998, so the affidavit continues, Potter searched the trash at Baldwin's home address. He found "marijuana leaves and stems recently cut from a mature marijuana plant. The marijuana was fresh green and still moist."

He also, he said, had found "marijuana seeds and a hydroponic grow rock. There were also two black 1/2 gallon planting pots commonly used in indoor marijuana grows and four packages of 'rain drop' irrigation equipment commonly used in indoor marijuana grows." He concluded on the basis of his specific training in the investigation of narcotics and his ten years of experience in approximately three hundred narcotics cases that "[t]he items found in the trash inspection reveal an ongoing criminal activity to grow marijuana indoors." He also concluded that "it is common for persons

involved in the cultivation of marijuana to also be involved in the sale of marijuana." Potter sought a warrant listing the documents and property he expected to find; he did not mention guns. On September 23, 1998, a state court judge issued the search warrant that Potter sought.

According to the plaintiffs' evidence, the only marijuana in their trash searched by Potter were blackened bits of marijuana wrapped in a paper towel, the remnants of smoked marijuana. They bolster their claim of falsity in Potter's affidavit by thirteen declarations from other individuals whose trash was searched by MET. In each instance MET officers swore they found "marijuana leaves and stems recently cut from a mature marijuana plant" and that "the marijuana was fresh green and still moist." In each instance, these thirteen individuals swore they placed no marijuana or products of marijuana in their trash.

The Baldwins' further evidence is that the "rain drop" irrigation equipment was only for outdoor landscaping and that this fact should have been obvious to a trained narcotics investigator. The equipment included a sprinkler spraying water up to 14 feet, a soaker hose, and 6" heavy duty support stakes; none of these items are used in an indoor grow. The two black gardening pots pointed to no illegal activity. The "grow rock" in Potter's affidavit was, the plaintiffs also state, a lava rock with no implication of criminal activity.

In the early dawn of the day that Potter obtained the warrant, according to the sworn declaration of Michael Baldwin, a group of five officers including Potter entered Baldwin's home "para-military style" without knocking. Officer Reed encountered Baldwin as Baldwin came into the house from the back door. Reed pointed his gun at him and ordered him to lie down. Baldwin complied with the order. Reed "then pushed his gun at the rear of [Baldwin's] head and placed his knee in the small of [Baldwin's] back, all the while

pressing a loaded firearm against the back of [Baldwin's] head." Baldwin was terrified that the gun would go off.

According to the sworn deposition of Georgia Chacko, she was clothed only in a T-shirt and cotton briefs and just getting up to start her day when she opened her bedroom door to be confronted by a flashlight in her face and fingers sharply poking five to seven times at her throat and forcing her back into the bedroom. A voice told her to get on the floor. A gun was pointed at her, then brought into contact with her head for 30 seconds. She got on the ground. The unidentified gunman kneed her in the small of her back and handcuffed her. The gunman was Potter.

PROCEEDINGS

On October 12, 2001, the plaintiffs filed their first amended complaint. The County moved for summary judgment on the ground of the qualified immunity of the officers. On April 2, 2004, the district court denied the motion, ruling that triable material issues of fact existed as to the plaintiffs' claims of excessive force, judicial deception, and conspiracy by the MET team, all in violation of 42 U.S.C. § 1983; state law claims similarly remained open to credibility determinations by a jury.

The County appeals.

ANALYSIS

[1] *Jurisdiction.* Where there is a dispute as to material issues of fact, we have no jurisdiction. *Johnson v. Jones,* 515 U.S. 304, 313, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). On the face of the district court's decision finding disputed facts, we are prevented from proceeding further. The County avoids dismissal, however, by stating that it "accepted the Baldwins' evidence for purposes of summary

judgment, thereby obviating any alleged factual disputes" and that therefore "no factual disputes preclude appellate jurisdiction over this interlocutory appeal." The appeal is directed only to denial of immunity if the plaintiffs' facts are accepted; so the appeal is directed to appealable issues of law. *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Although the defendants have found it hard to stick to their concession and occasionally appear to dispute the facts, we take them at their word and for this appeal accept only the plaintiffs' version of what happened. The facts for this appeal are not alleged, they are admitted. Consequently, we have jurisdiction.

[2] *Excessive force.* The County argues that "objectively reasonable" officers could have believed that "the exigency of the entry" justified the batteries on the plaintiffs. On the conceded facts before us, whatever exigency existed was insufficient to justify the batteries. Baldwin was a practicing dentist. Nothing in the record indicates that the officers had reason to believe that he would resist or flee. The officers had stated no belief that the plaintiffs would be armed; they mentioned no criminal history or conspiracy that could have justified such a belief. They had no reason not to identify themselves before giving orders to the plaintiffs. Invading a home in the early morning, they have stated no fact justifying their batteries. They violated the civil right of the plaintiffs to be free from battery by gun-wielding officers, a right established in this circuit since 1984. *McKenzie v. Lamb,* 738 F.2d 1005, 1010 (9th Cir.1984) (Kennedy, J.). Potter's fingers at the throat of Baldwin's wife constitute a separate battery that a reasonable officer would know was excessive. The governmental interests in using handcuffs are at their maximum when "a warrant authorizes a search for weapons and a wanted gang member resides on the premises." *Muehler v. Mena,* --- U.S. ----, 125 S.Ct. 1465, 1469, 161 L.Ed.2d 299 (2005). Conversely, governmental interests are at a minimum when

the searchers assert no belief that weapons will be found and no belief other than that the occupants of the house are a practicing dentist and his wife. We conclude that "the law at th [e] time [of the search] ... clearly establish[ed] that the officer's conduct could violate the constitution." *Brosseau v. Haugen,* --- U.S. ----, ----, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004).

[3] *Judicial Deception.* The Fourth Amendment is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority. It is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate. This obvious truth is met by the County with the argument that we should redact Potter's affidavit, purge it of its lies, and find what remains sufficient to justify the issuance of the warrant. *See Liston v. County of Riverside,* 120 F.3d 965, 972 (9th Cir.1997). Objectively, the County adds, there was enough to justify a search. Its arguments are unpersuasive.

First, when Potter's lies are taken out, what is left is an unidentified citizen at an unidentified date telling a sheriff's deputy of marijuana growing at an unidentified time; also the presence of a rock and two pots, the uses of which are ambiguous. No magistrate could have authorized a search on this basis, essentially amounting to an informant's tentative tip.

[4] Second, the County shifts its ground in arguing that "objectively"--that is, not within Potter's affidavit--there were facts justifying the search: .08 grams of burnt marijuana, "virtually unrecognizable as marijuana," are conceded to have been in the trash by the plaintiffs. The County cites in support of its argument *Devenpeck v. Alford,* — U.S. ----, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), holding that not the officer's motive in making an arrest but the objective circumstances are to be considered by a court

judging the officer's action. *Devenpeck* does not speak to our case. Here, it is what facts were alleged to induce the magistrate to act. Plainly, Potter's lies were substantial in moving the magistrate. The force of the lies on the mind of the magistrate cannot be bleached out.

The County invokes a fundamental case on the Fourth Amendment, *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *Franks* does permit a court to purge the false statements and to sustain the warrant if the unpurged residue would justify it. But what will sustain the warrant must already be within it. The County is pointing to evidence not cited in the warrant. That evidence cannot sustain the warrant. *See United States v. Davis,* 714 F.2d 896, 899 (9th Cir.1983) (under *Franks,* "[t]he fact that probable cause did exist and could have been established by a truthful affidavit does not cure the error.").

[5] The plaintiffs' established civil rights were violated by presentation of the false affidavit. *Liston,* 120 F.3d at 972-73. Qualified immunity was rightly denied.

[6] *Conspiracy.* Conspiracy to violate a citizen's rights under the Fourth Amendment by lying to the magistrate is evidently as much a violation of an established constitutional right as the perjury itself. Whether there is sufficient evidence of the conspiracy is for a jury to decide. No immunity exists for the conspiracy.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL W. BALDWIN, DDS; GEORGIA CHACKO,
Plaintiffs-Appellees,

v.

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFREY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; REED, OFFICER,
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No. 04-15848
D.C. No.
CV-01-01177-MCE
OPINION

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for the Eastern District of California
Morrison C. England, District Judge, Presiding

Argued and Submitted
March 18, 2005—San Francisco, California

Filed April 19, 2005

Before: John T. Noonan, Sidney R. Thomas, and Raymond C. Fisher, Circuit Judges.

Opinion by Judge Noonan

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ANALYSIS

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[3] *Judicial Deception.* The Fourth Amendment is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority. It is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate. This obvious truth is met by the County with the argument that we should redact Potter's affidavit, purge it of its lies,

and find what remains sufficient to justify the issuance of the warrant. *See Liston v. County of Riverside,* 120 F.3d 965, 972 (9th Cir.1997). Objectively, the County adds, there was enough to justify a search. Its arguments are unpersuasive.

First, when Potter's lies are taken out, what is left is an unidentified citizen at an unidentified date telling a sheriff's deputy of marijuana growing at an unidentified time; also the presence of a rock and two pots, the uses of which are ambiguous. No magistrate could have authorized a search on this basis, essentially amounting to an informant's tentative tip.

[4] Second, the County shifts its ground in arguing that "objectively"--that is, not within Potter's affidavit--there were facts justifying the search: .08 grams of burnt marijuana, "virtually unrecognizable as marijuana," are conceded to have been in the trash by the plaintiffs. The County cites in support of its argument *Devenpeck v. Alford,* --- U.S. ----, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004), holding that not the officer's motive in making an arrest but ***782** the objective circumstances are to be considered by a court judging the officer's action. *Devenpeck* does not speak to our case. Here, it is what facts were alleged to induce the magistrate to act. Plainly, Potter's lies were substantial in moving the magistrate. The force of the lies on the mind of the magistrate cannot be bleached out.

[5] The plaintiffs' established civil rights were violated by presentation of the false affidavit. *Liston,* 120 F.3d at 972-73. Qualified immunity was rightly denied.

[6] *Conspiracy.* Conspiracy to violate a citizen's rights under the Fourth Amendment by lying to the magistrate is evidently as much a violation of an established constitutional right as the perjury itself. Whether there is sufficient evidence of the conspiracy is for a jury to decide. No immunity exists for the conspiracy.

AFFIRMED

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GEORGIA CHACKO, an individual and MICHAEL BALDWIN, an individual,
Plaintiffs,

v.

PLACER COUNTY, PLACER COUNTY SHERIFF'S DEPARTMENT, OFFICER TRACY GRANT, OFFICER RON GOODPASTER, OFFICER KEVIN BASANA, OFFICER BRIAN WIGGAM, OFFICER JEFF POTTER, OFFICER REED, OFFICER STEPHEN D'ARCY, and DOES ONE to FIFTY,
Defendants.

NO. CIV. S 01-1177 MCE GGH

MEMORANDUM AND ORDER

Filed April 2, 2004

Before: Morrison C. England, District Judge

Georgia Chacko and Michael Baldwin (collectively, the "Plaintiffs") have brought the present action against Defendants Placer County, Placer County Sheriff's Department, Officer Tracy Grant, Officer Ron Goodpaster, Officer Kevin Basana, Officer Brian Wiggam, Officer Jeff Potter, Officer Reed and Officer D'Arcy (collectively, the "Defendants").

Plaintiffs allege a variety of state and federal law violations, including Constituional violations, false arrest, assault, battery, defamation and RICO violations. Defendants now move for summary judgment or, in the alternative, summary adjudication. For the reasons below, Defendants' motion is granted in part and denied in part.

BACKGROUND

This suit arises out of the search of Plaintiffs' home, and Plaintiffs' subsequent arrest, by members of the Placer County Sheriffs Marijuana Eradication Team ("MET"). The team was comprised of Officers Potter, Reed, Goodpaster, Besana and Grant, all of whom are named as Defendants herein.

Prior to executing their search of Plaintiff's home on September 23, 1998, a state court judge issued the requisite warrant based on a statement of probably cause by Officer Potter. Potter claimed he initially learned that Plaintiffs might be cultivating marijuana through a confidential informant, and alleged that a subsequent search of garbage left at Plaintiffs' residence, located at 5355 Moss Lane in Loomis, California, revealed the presence of a small amount of "marijuana leaves and stems recently cut from a mature marijuana plant" that were "fresh green and still moist." In addition, Potter alleged he discovered irrigation equipment, pots and "grow" rock in Plaintiffs' trash also pointing to marijuana cultivation.

Plaintiffs, for their part, deny that the ever placed marijuana cuttings in their trash, and assert even more fundamentally that the marijuana plants they did have were not "mature" as claimed by Officer Potter. With respect to the blackened bits of marijuana that were found in their garbage wrapped in a paper towel, Plaintiffs argue that such material was simply remnants of smoked marijuana. Significantly, they point to some thirteen declarations (attached as Exhibit "S" to the Turley Declaration in opposition to this Motion), all from individuals whose trash was searched by the MET Team and who denied placing marijuana products in their garbage, despite claims by MET Team members that the trash searches in question

revealed exactly the same "marijuana leaves and stems recently cut from a mature marijuana plant" that were "fresh green and still moist."[1]

Plaintiffs further contend that it should have been obvious to any drug enforcement officer that the irrigation equipment was for outside landscaping use as opposed to inside marijuana cultivation.

According to Plaintiffs, all this evidence raises questions as to the MET Team members' truthfulness, and particularly to whether Officer Potter may have misled the state court judge in obtaining a search warrant for Plaintiffs' home.

With respect to the search itself, Plaintiffs contend that their rights were violated by MET Team members who, rather than knock and announce their presence, simply "entered the residence para-military style" and "terrorized and manhandled" them both. (Baldwin Declaration, ¶ 6, Chacko Declaration, ¶ 2).[2] Plaintiff Baldwin claims that Officer Reed placed a gun to the back of Baldwin's head and a knee into the small of his back despite the fact that Baldwin alleges he never offered any resistance or posed any threat. Similarly, Plaintiff Chacko claims that Officer Potter confronted her in her bedroom, immediately jammed his fingers into her trachea, and forced her to the ground with a gun to her head. Given the fact she was wearing only underwear and a "small t-shirt top", Plaintiff Chacko argues she was "visually groped" by a group of officers, including Defendants Potter and Goodpaster. According to Plaintiff, when Potter helped the handcuffed Chacko put on a pair of pants, his face was only a few inches from her waist. (Chacko Declaration, ¶ 4). Like her then-husband Plaintiff Baldwin, Georgia Chacko alleges she was treated in this manner despite the fact she offered no resistance and posed no threat to the officers.

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[1] For purposes of this motion, Defendants' evidentiary objections to these declarations are overruled.

[2] Defendants' evidentiary objections to Plaintiff's declarations are overruled with respect to those portions of said declarations cited by the Court in this Order. Otherwise, to the extent the declarations were not relied on by the Court in ruling on this Motion any remaining objections need not be considered.

Plaintiffs do not dispute that some 146 marijuana plants, including some fifty unrooted clones, were discovered by the MET team in the course of searching their residence. Plaintiffs claim, however, that the MET Team ignored their requests to consider the prescription posted on the premises for medical marijuana use, stating that the provisions of Proposition 215 (California Health and Safety Code § 11362.5, meant nothing to them.

Plaintiffs do take issue with Defendants' claim that they were marketing the marijuana grown in their home. They contend that Defendant Whigam, an officer whose only role in this case was to testify at Plaintiffs' Preliminary Hearing, lied about the projected yields of Plaintiffs' marijuana plants as well as the reasonable dosage amount, all to create the impression that the marijuana involved was far more than that needed for Plaintiffs' own personal consumption. They further contend that Defendant D'Arcy, the Undersheriff of Placer County, defamed Plaintiffs through untrue allegations contained within a press release that effectively destroyed Plaintiff Baldwin's dental practice.

On or about May 20, 2003, Defendants moved for summary judgment, primarily on grounds that Plaintiffs' failure to respond to requests for admission provided the necessary evidentiary support. Defendants also argued, however, that Plaintiffs could not state an excessive force claim in any event[3] with respect to the manner in which Plaintiffs were arrested because they were entitled to qualified immunity. Plaintiffs further contended that Undersheriff D'Arcy's claims were privileged as a matter of law pursuant to both California Civil Code § 47(a) and California Government Code § 821.6. while this Court permitted Plaintiffs to withdraw their admissions (and file delayed responses to Defendants' requests for admissions) by Memorandum and Order filed July 8, 2003, it did reject Plaintiff's qualified immunity claim, reasoning on page 11 that any determination as to the events of September 23, 2002

[3] In their First Amended Complaint, Plaintiff cite excessive force claims as support not only for Plaintiff's federal claim for violation of constitutional rights under the Fourth Amendment pursuant to 42 U.S.C. §1983 (First Cause of Action) but also for Plaintiffs' state law assault and battery claims (Plaintiffs' Sixth and Seventh Causes of Action, respectively).

"requires a credibility determination of the various parties involved. Such a determination is squarely within the province of a jury. See Hoover v. Switlik Parachute Co., 663 F.2d 964, 968 (9th Cir. 1981)(citing Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628, 64 S. Ct. 724, 88 L. Ed. 967 (1944). Accordingly, summary judgment is not appropriate in this case on the issue of qualified immunity."

The Court furthered found that Defendant D'Arcy was immune from liability for issuance of the press release after Plaintiff's arrest.

In now moving for summary judgment a second time, Defendants ask the Court to rule in their favor as a matter of law as to each cause of action remaining in Plaintiffs' First Amended Complaint.

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Rule 56 also allows a court to grant summary adjudication on part of a claim or defense. *See* Fed. R. Civ. P. 56(a) ("A party seeking to recover upon a claim...may...move...for a summary judgment in the party's favor upon all or any part thereof."); *see also* Allstate Ins. Co. v. Madan, 889 F. Supp. 374, 378-79 (C.D. Cal. 1995); France Stone Co., Inc. v. Charter Township of Monroe, 790 F. Supp. 707, 710 (E.D. Mich. 1992).

The standard that applies to a motion for summary adjudication is the same as that which applies to a motion for summary judgment. See Fed. R. Civ. P. 56(a), 56(c); Mora v. ChemTronics, 16 F. Supp. 2d 1192, 1200 (S.D. Cal. 1998).

In considering a motion for summary judgment, the court must examine all the evidence in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Once the moving party meets the requirements of Rule 56 by showing that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion, who "must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Genuine factual issues must exist that "can be resolved only by a finder of fact, because they may reasonably be resolved in favor of either party." Id. At 250. In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. *See* T.W. Elec. V. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-631 (9th Cir. 1987), citing Matsushita Elec. Indus. Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

ANALYSIS

In considering Defendants' various requests for summary judgment/adjudication, which extend both to particular claims as well as individual parties, it should first be clarified just what claims remain in dispute at the close of briefing and oral argument in this matter. Specifically, Plaintiffs have not opposed summary adjudication as to their claims for equitable relief pursuant to the Second and Third Causes of Action, and further do not oppose summary judgment as to the Fifth Cause of Action (False Imprisonment/False Arrest) and the Ninth Cause of Action (for violation of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§1961-68). Summary adjudication as to those causes of action is therefore granted.[4] In addition, the Court's prior July 8, 2003 ruling disposes of Plaintiffs' state law defamation and libel claims (as state in the Eighth Cause of Action, which alleges that Defendants are liable for press releases to the printed and

[4] It should also be noted that the Joint Pre-Trial Conference Statement, filed on March 8, 2004 and signed on behalf of both Plaintiffs and Defendants, confirms at paragraph XV that these causes of action have been abandoned.

wireless media) because the Court found that the release at issue was privileged as a matter of law.

Each of Plaintiff's remaining claims, as well as the liability of individual defendants, will now be addressed.

A. Plaintiffs' Section 1983 Claim

Plaintiffs have pled a multifaceted Section 1983 claim with numerous theories of liability. Under the broad rubric of the Fourth Amendment's prohibition of unreasonable search and seizure, they allege 1) that Defendants engaged in judicial deception by presenting false and/or misleading information to the state court judge who issued the search warrant for Plaintiffs' residence; 2) that Defendants conspired with each other to engage in such false/misleading behavior by claiming that various members of the MET Team had provided similarly false/misleading information to state judicial officers in the past; and 3) that Defendants utilized excessive force in effectuating the search of Plaintiffs' residence and their subsequent arrest.

As an initial matter, summary judgment cannot be had as to Plaintiff's Section 1983 claim for the simple reason that this Court has already determined that the excessive force component of the claim is not amenable to summary judgment as requiring "credibility determination[s]...squarely within the province of a jury." (July 8, 2003 Memorandum and Order, 11:22-12:1). Because the Section 1983 claim accordingly survives, the Court is loathe to engage in piecemeal disposition of other issues that will not be dispositive of the claim as a whole. Nonetheless, even a cursory examination of the circumstances of this case indicates that all of Plaintiff's Section 1983 contentions require complicated factual assessments making them ill-suited to resolution on summary judgment. Triable issues of fact clearly exist, for example, as to whether Potter engaged in judicial deception in this case, and whether other MET Team members conspired to do so based on inferences discernible from

their conduct on other occasions. Summary judgment as to Plaintiffs' First Cause of Action is accordingly denied.[5]

B. Pendent State Law Claims

In addition to their Section 1983 claim, Plaintiffs also have three remaining state law claims. The Fourth Cause of Action, which alleges a violation of Article I, Section 13 of the California Constitution, is asserted against Defendant Potter. In their Sixth Cause of Action, Plaintiffs plead assault against Defendants Reed, Goodpastor, Besana, Potter and Reed. Finally, by way of the Seventh Cause of Action, Plaintiff seeks damages from Defendants Potter and Reed for battery.

The Fourth Cause of Action pleads a violation under the California Constitution for Defendant Potter's alleged presentation of a false search warrant affidavit, just as Plaintiffs' Section 1983 claim make the same assertion under the federal constitution. The reasons why summary judgment cannot be had as to the federal claim are equally applicable to its state law counterpart.

With respect to the assault and battery claims, as indicated above this Court has already ruled, in the context of the excessive force component of Plaintiffs' Section 1983 claim, that any determination as to what occurred on September 23, 1998 requires credibility determinations not amenable to disposition on summary judgment. That reasoning also precludes summary judgment as to Plaintiffs' state law claims premised on the same alleged excessive force.

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[5] Although not specifically pled in Plaintiffs' First Amended Complaint, Defendants also request the Court to rule in their favor to the extent said complaint may seek to impose liability on Defendant County pursuant to Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978). Any Monell claim here would appear to fall within the purview of the Plaintiffs' cause of action for violation of Section 1983. Just as summary judgment cannot be granted as Plaintiffs' Section 1983 claims as a whole, the Court cannot decide as a matter of law that the County's training of its METS Team officers was inadequate, or that the County did not engage in a custom or practice to violate the constitutional rights of marijuana cultivators like Plaintiffs herein. Any such determinations clearly require the same kind of factual determinations that cannot be resolved through summary judgment.

Although the causes of action which continue to be asserted by Plaintiffs remain visible, that does not mean that all the defendants named by Plaintiffs should either remain in this lawsuit or continue to be parties as to certain claims. We now turn to the liability of individual defendants.

C. Liability of Individual Defendants

1. Brian Whigam. As indicated above, Defendant Whigam's only involvement in this case was in offering testimony at the Preliminary Hearing on Plaintiffs' criminal charges. Whigam did not participate in the garbage search, did not seek a search warrant an was not involved in the entry and search of Plaintiffs' residence. Nor was he a member of the MET Team at the time of said entry and search. Whigam did testify as to the potential yield of the marijuana garden maintained by Plaintiffs, as well as the amount of marijuana typically consumed by a user.

The general rule that police officers are absolute immune when providing testimony is subject to an exception for complaining witnesses who actually bring about a prosecution through perjured testimony. *See* Harris v. Roderick, 126 F. 3d 1189, 1198-99 (9th Cir. 1997). In this case, there is no question that marijuana has no medical use which would except it from the Controlled Substances Act. United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 493 (2001). Plaintiffs unquestionably had 146 marijuana plants growing in their home. Whigam's testimony had no bearing on that undisputed fact, and it is illogical to assume, as Plaintiffs apparently do, that they would not have been prosecuted in the absence of Whigam's testimony. Hence the exception to an officer's absolute immunity as articulated in Harris does not apply here. Further, as Defendants point out, predictions of yield are necessarily somewhat imprecise and Whigam based his testimony on his experience and training over years of investigating marijuana-related offenses. There is no evidence that he deliberately lied or misled the Grand Jury during Plaintiffs' Preliminary Hearing. As such, summary judgment in Whigam's favor is proper.

2. Stephen D'Arcy. Undersheriff D'Arcy's sole involvement in this case was his dissemination of a press release

after Plaintiffs' arrest. As stated above, this Court has already ruled that his issuance of that release was privileged. Although that finding resulted in summary judgment as to Plaintiffs' state law libel and defamation claims as a result of the allegedly offending press release, Plaintiffs now attempt to resurrect the same claims in the context of their Section 1983 claim under the "stigma plus" test recognized by Paul v. Davis, 424 U.S. 693, 711 (1976) (*See also* WMX Technologies Inc. v. Miller, 80 F. 3d 1315, 1319-20 (9th Cir. 1996)).

To begin with, Plaintiff's Section 1983 claims are limited on their face to allegations that Defendants violated Plaintiffs' right, under the Fourth Amendment, and instead arises under Fourteenth Amendment liberty protections. WMX Technologies, 80 F. 3d at 1319. In addition, Plaintiffs cannot meet the "stigma plus" test for imposing liability under Section 1983 in any event.

The "stigma plus" test requires that defamation be accompanied by an injury directly caused by the government, rather than an injury caused by the act of some third party in reaction to the government's alleged defamatory statements. Id. at 1320. Here any damage to Plaintiffs' reputation or business was, at most, only in reaction to the press release issue by Defendant D'Arcy. Such damages are not recoverable through Section 1983. Id. Summary judgment terminating Defendant D'Arcy's involvement in this case is therefore appropriate.

3. Other Defendants. Given the conspiracy allegations as outlined above, the Court is unwilling to grant summary judgment as to any of the members of the MET Team. Defendants Grant, Goodpaster and Besana nonetheless have no place in Plaintiff's Sixth Cause of Action, for assault. No evidence has been presented to suggest that any assault as to Plaintiffs was conspiratorial in nature. It is uncontroverted that the only defendants who even arguably "assaulted" Plaintiffs in the course of effectuating their arrests were Officers Potter and Reed.[6]

[6] The Court declines to accept any argument on the part of Plaintiff Chacko that other officers "visually groped" her and may consequently be potentially liable for assault on that basis.

CONCLUSION

For the reasons above, Defendants' Motion for Summary Judgment is DENIED. Summary adjudication is granted, however, as to the Second, Third, Fifth, Eighth, and Ninth Causes of Action. In addition, summary judgment is granted as to Defendants Whigam and D'Arcy. Finally, Defendants Goodpastor, Grant and Besana are entitled to summary adjudication in their favor as to the Sixth Cause of Action, for assault.

IT IS SO ORDERED.

DATED: 4 – 2- 04

/s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, Jr.
UNITED STATES DISTRICT JUDGE

No. 05-0586

In The

Supreme Court of the United States

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WHIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFERY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; OFFICER REED,

Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRED IN FAILING TO CONSIDER ALL TRUTHFUL ASSERTIONS WITHIN AN AFFIDAVIT WHEN CONSTRUING THE SUFFICIENCY OF PROBABLE CAUSE ASSERTED TO SUPPORT A SEARCH WARRANT.

2. WHETHER THE NINTH CIRCUIT GRANTED UNWARRANTED DEFERENCE TO THE WHITE-COLLAR NATURE OF THE PUBLICLY REPRESENTED OCCUPATION OF A SUSPECTED NARCOTICS TRAFFICKER IN FINDING A FOURTH AMENDMENT VIOLATION BASED ON THE FORCE BRIEFLY EMPLOYED TO DETAIN THE SUSPECT DURING THE EXECUTION OF A SEARCH WARRANT.

3. WHETHER POTTER'S CONDUCT DURING THE COURSE OF A SEARCH OF A SUSPECTED DRUG TRAFFICKER'S HOME VIOLATED "CLEARLY ESTABLISHED" LAW WARRANTING THE DENIAL OF HIS RIGHT TO QUALIFIED IMMUNITY.

PARTIES TO THE PROCEEDINGS

Petitioner

Jeffery Potter, Auburn California,

Respondents

Michael Baldwin DDS and Georgia Chacko, Carmichael, California.

The following parties named in the caption of the underlying action have not petitioned for review: Placer County, Placer County Sheriff's Department, Brian Whiggam, Kevin Besana, Ron Goodpaster, Stephen L. D'Arcy and Tracy Grant.

Officer Reed has filed a separate petition for review.

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In The

Supreme Court of the United States

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WHIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFERY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; OFFICER REED,

Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner seek review by this Court asserting that the lower courts failed to consider all truthful statements contained in Petitioner's search warrant affidavit, granted undue deference to Respondent Dr. Baldwin's white collar profession, and improperly denied Petitioner qualified immunity for battering Respondent Chacko during the execution of the search warrant. Petitioner does not establish that the decision of the Ninth Circuit Court conflicts with other court of appeal decisions, is in conflict with decisions of this Court, or represents an important question that should be addressed by this court, but rather the heart of each of Petitioner's claims of error consist of nothing more than claims that the court made erroneous factual findings or misapplied properly stated rules. Once again, Petitioners claims misstate the record and fail on the merits.

STATEMENT

For purposes of appeal and summary judgment motion, Petitioners have conceded that the facts as presented by the Respondents are undisputed.

Judicial Deception by Petitioner Potter:

The record shows that on September 22, 1998 Officer Potter of the Placer County Sheriff's Department MET (Marijuana Eradication Team) applied for a search warrant for the residence of Michael Baldwin and Georgia Baldwin (now Chacko). The search warrant affidavit set forth that Officer Potter learned on July 16, 1998 from Officer Besena, who had previously learned from Officer Reed, that a citizen informant, at some unknown time before July16, 1998, had informed Officer Reed that Michael Baldwin "was possibly growing marijuana." Additional information provided by the informant describing Dr. Baldwin's vehicle and location of his residence was not completely accurate, as he described a different color vehicle from Dr. Baldwin's and located the residence at "Old Moss Lane" and not Moss Lane, where Dr. Baldwin resided. Old Moss Lane is a different road in that area. After locating the residence address of Dr. Michael Baldwin, Officer Potter then "contacted Placer county[sic] Waste Management" and determined that the trash at Baldwin's residence was collected on Wednesdays. There is no such entity as Placer County Waste Management.

Officer Potter then states in the affidavit that on September 16, 1998 he conducted a search of the trash at Baldwin's residence, and found "marijuana leaves and stems recently cut from a mature marijuana plant. The marijuana was fresh green and still moist. I also found marijuana seeds and a hydroponic grow rock. There was also two black 2 1/2 gallon planting pots commonly used in indoor marijuana grows and four packages

of "rain drip" irrigation equipment commonly used in indoor marijuana grows."

When the plaintiffs were finally able to view the evidence claimed by Potter in the search warrant affidavit to be fresh, green and still moist recent cuttings from mature marijuana plants, they saw, in fact, that what was really allegedly found in their trash was a very small amount of used, fragmented, burned material unrecognizable as marijuana, weighing 0.08 grams, which was reported to be wrapped in a tissue. The tissue was not burned. It is not disputed that the material in the tissue had been partially burned. Plaintiffs deny ever placing any fresh green marijuana cuttings in the trash. Moreover, as the marijuana that was being cultivated in the residence, pursuant to California Health and Safety Code Sec. 11362.5, were immature plants, mature cuttings could never have been thrown into the trash.

As to the "four packages of "rain drip" irrigation equipment commonly used in indoor marijuana grows, this equipment is not used for indoor gardening at all, never mind indoor hydroponic marijuana grows. The packages described exterior gardening equipment, including a 3/4" PIPE THREAD SWIVEL TEE, a FULL CIRCLE ADJUSTABLE STREAM SPRAYER, A SOAKER HOSE, AND 6" HEAVY DUTY SUPPORT STAKES. These items were obviously for outdoor irrigation, such as the sprinkler that sprays water up to 14 feet, and each item involved irrigation for large amounts of water. Contrary to the assertion of Officer Potter, this is inconsistent with an and indoor hydroponic marijuana grow, while it is entirely consistent with irrigation for the multiple acre landscape of the Baldwin residence.

Potter also claimed in the search warrant affidavit that there were "also two black 2 1/2 gallon planting pots commonly used in indoor marijuana grows." The pots were on

the ground in the area where the trash cans were kept, not in the trash can. Furthermore the packages once containing the "Rain Drip" equipment were also on the ground, accompanying the black pots. The area around where the trash cans were left for pick up was freshly landscaped within a week or two of the alleged date of Potter's trash search of Dr. Baldwin's residence.

In addition, catalogue material submitted by Petitioners in their Excerpt of Record to their original appeal brief which had nothing to do with the search of the residence or the search warrant affidavit, demonstrated that a lava rock is not properly used as a growing medium. Further Potter admitted in a Declaration that the lava rock is not a grow rock, but is only similar to grow rocks. Meanwhile, the evidence seized from the Baldwin's trash that Potter described in the affidavit as a "grow rock" was a lava rock.

Excessive Force:

In the early dawn hours of September 23, 1998, a group of five officers entered Dr. Baldwin's home "para-military style" without knocking. Officer Potter, among them, was the author of the Search Warrant Affidavit. Officer Reed encountered Dr. Baldwin as Baldwin came into the house from the back door. Reed pointed his gun at him and ordered him to lie down. Baldwin complied with the order. Reed placed his knee in the small of Baldwin's back, pinning him to the floor, then pushed his gun at the rear of Baldwin's head. Baldwin was terrified that the gun would go off the whole time the gun was pressed against his head. At no time did Baldwin offer any resistance to Officer Reed.

After they picked up Dr. Baldwin, they began to interrogate him. Baldwin told the officers that he and Chacko were bona fide medical marijuana patients and that he was

cultivating his medicine in accordance with the only guidelines existing in the state pursuant to California Health & Safety Code Section 11362.5, guidelines which were adopted by the City of Oakland. He also told them where to find their physician's recommendations and demanded defendants to call and verify that it was a valid recommendation under California Health & Safety Code Section 11362.5. Officer Goodpaster, retorted, "There is no Proposition 215 in Placer County."

The number of plants found in the residence was within the Oakland City Guidelines. At the time of the search Placer County had no guidelines regarding the number of plants a patient could legally cultivate. The Oakland City Guidelines were the only ones in place within the entire State of California at the time.

Georgia Chacko was clothed only in a T-shirt and cotton briefs, was just getting up to start her day, still groggy from sleep, when she opened her bedroom door. Instantly she was confronted by a flashlight in her face and Potter's fingers forcibly jammed into her thrachea five to seven times, forcing her back into the bedroom. A voice told her to turn around and lie on the floor. As Chacko complied, the unidentified gunman stuck a gun to her head as she lay on the floor face down. She put her hands behind her back. The unidentified gunman, Potter, kneed her in the small of her back pinning her to the floor and handcuffed her.

Georgia Chacko was then interrogated. Chacko explained to the defendants that she and Baldwin were legitimate medical marijuana patients with valid and current doctor's recommendations under California Health & Safety Code Section 11362.5. Petitioners insisted that Proposition 215 (California Health & Safety Code Section 11362.5) meant nothing to them and they did not recognize it as the law in California.

Ultimately, all criminal charges were dropped against Dr. Baldwin and Mrs. Chacko.

Based upon this, Ninth Circuit panel (agreeing with the District Court) held correctly that Potter committed judicial deception in submitting the search warrant affidavit, and that, per *Franks*, once the "lies" were taken out no magistrate could have authorized a search warrant. Specifically, the Court recognized that Potter's statement in the search warrant affidavit that he had found "marijuana leaves and stems recently cut from a mature marijuana plant. The marijuana was fresh green and still moist" during the trash search was a material misrepresentation that had to be excised from the affidavit; that Respondents denied placing any material in their trash; and that Respondents had submitted 13 declarations from other people whose trash had allegedly been search by the MET where the officers swore they found "marijuana leaves and stems recently cut from a mature marijuana plant" and that "the marijuana was fresh green and still moist" while each of the declarants swore they placed no marijuana or product of marijuana in their trash.

The Court, following *Franks*, correctly declined to add statements in the affidavit to sustain the search warrant, holding correctly that only what is already in the warrant affidavit can be used to sustain it, and that evidence not in the affidavit cannot be used to sustain the warrant. No where in the affidavit did Potter assert that he had found .08 grams of burnt material wrapped in a paper towel that was "virtually unrecognizable as marijuana." The Court correctly refused to add such an assertion to the affidavit.

In addition, the Court held that a reasonable officer, given all the circumstances, would know that the batteries committed against Mrs, Chacko were excessive. The officers stated no belief that Respondents would be armed; they

mentioned no criminal history or conspiracy that could have justified such a belief. Thus, when Potter encountered Mrs. Chacko clothed only in a t-shirt and cotton briefs, jabbed her in the trachea five to seven times, told her to get on the ground, and while she was complying Potter pressed his gun physically against her head, Potter's conduct violated Mrs. Chacko's right to be free from battery by officers, a right clearly established in the Ninth Circuit since 1984, per the decision in *McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1010.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit did consider all truthful assertions contained within Potter's search warrant affidavit, and therefore was not a departure from *Franks*.

In the decision, the lower Courts followed the requirements of *Franks v. Delaware* by disregarding the intentionally false statements and looking at the remaining statements in the affidavit, which both courts correctly held was insufficient for a Magistrate to issue a search warrant. (*Franks v. Delaware* (1978) 438 U.S. 154, 176-177)

While Petitioner Potter now claims to challenge this determination, what he actually is seeking is for the Court to rewrite the affidavit and supply truthful statements to rehabilitate the affidavit, and not just to analyze the remaining truthful statements after the misrepresentations had been removed. The settled facts concede that Potter never found "marijuana leaves and stems recently cut from a mature marijuana plant. The marijuana was fresh green and still moist" in Respondents' trash. Petitioner argues that the Court should rewrite this false assertion so a Court could consider that Potter claims to have found during the search of the trash

.08 grams of a burnt ash, one single seed, all of which was "virtually unrecognizable" as cannabis and that was not tested to be determined to be cannabis. But such an assertion, that Potter found burnt ash and a single seed, untested, and virtually unrecognizable as marijuana was not contained in the search warrant affidavit, and the lower Courts were correct in declining Petitioner's invitation to insert such statements in the affidavit to attempt to rehabilitate it. *Franks* requires only that when the "material that is the subject of the alleged falsity or reckless disregard is set to one side, [if] there remains sufficient content in the warrant affidavit to support a finding of probable cause" a litigant has failed to state their case." (*Franks*, at 171-172) *Franks* does not hold that a Court should add statements that were never in the warrant affidavit. Petitioner cites no cases that hold this, and this Court should decline Petitioners invitation to add statements to an affidavit where the affiant originally chose falsehood. (*Franks v. Delaware* (1978) 438 U.S. 154, 176-177)

Moreover, in his Petition, Petitioner never actually spells out what truthful assertion was disregarded by the lower courts. Instead, Petitioner only generally argues that the false statement regarding the fresh green marijuana leaves and stems from a mature marijuana plant should be redacted to somehow still include an assertion that the virtually unrecognizable single seed and .08 grams of burnt ash that Petitioner claims now to have actually found be included. While Petitioner claims in their argument that Ninth Circuit completely redacted any reference to marijuana "despite the fact that respondents concede that some marijuana stems and leaves were found," this is not supported by the record. Respondents deny placing anything in their trash. Respondents also presented 13 declarations from individuals who declared that they had not placed anything in their trash, where members of the MET had sought search warrants with affidavits claiming to have found "marijuana leaves and stems recently cut from a mature

marijuana plant" and that "the marijuana was fresh green and still moist." which was the identical language Petitioner used in his affidavit. This inability of Petitioner to articulate the truthful assertion actually contained in the affidavit that the lower courts failed to consider reveals the lack of merit to Petitioner's position.

Even if the .08 grams of untested, virtually unrecognizable cannabis was somehow included in the affidavit, the affidavit would still fail. The Magistrate issuing the warrant for probable cause for violation of California law would have been well aware of the requirements of California Supreme Court cases like *People v. Fein* with regards to marijuana. That case flatly held that:

> "It is now well established that evidence of useless traces or residue of narcotic substances do not constitute sufficient evidence to sustain a conviction for possession of narcotics. (*People* v. *Leal*, 64 Cal.2d 504, 511-512 [50 Cal.Rptr. 777, 413 P.2d 665]; *People* v. *Thomas*, 246 Cal.App.2d 104, 111-112 [54 Cal.Rptr. 409]; *People* v. *Johnson*, 5 Cal.App.3d 844, 848 [85 Cal.Rptr. 238].) Although the presence of two burnt marijuana seeds might reasonably suggest that defendant or another occupant of the apartment formerly possessed and used marijuana, that inference would not justify their arrest for present use, possession or sale." (*People v. Fein* (1971) 4 cal.3d. 747, 754)

In addition, Petitioner was a state actor enforcing state law, and charged by the California Constitution to follow state law, even when it conflicts with federal law. (Cal. Const., Article 3, sec. 3.5(c)) Potter was seeking a search warrant based upon probable cause to believe that state law was being violated. Given that the possession or cultivation of cannabis was not

necessarily even illegal in California (Cal. H&S. Code sec. 11362.5), even if the 0.08 grams of burnt material not mentioned in the affidavit was included, probable cause to issue a warrant did not exist. Nowhere does Petitioner address this in his Petition.

Petitioner instead argues that the 8th Circuit case of *U.S. v. Briscoe* (8th Cir. 2003) 317 F.3d 906 and 9th Circuit case of *U.S. v. Celestine* (9th Cir. 2002) 324 F.3d 1095, 1102 support the sufficiency of the affidavit. However, these cases are distinguishable from the instant case. In *Briscoe*, the Court relied specifically upon the fact that what was found in the trash in that search was contraband under Iowa law. (*Briscoe*, at 908) In California, where this search occurred, what was found was not contraband, as it is possible under California law that possession and cultivation of cannabis is legal. (Cite Prop 215; *People v. Mower* (2002) 24 Cal.4th 457). In addition, irrespective of whether the cannabis is possessed legally, under Cal. Health and Safety Code section 11018, the single seed found might not even be defined as marijuana under California law, as only seeds capable of germinating are defined as marijuana. The single seed allegedly found by Potter was not tested to be shown as a cannabis seed capable of germinating, and no such assertion was made by Petitioner in his affidavit.

Similarly, *U.S. v. Celestine* (9th Cir. 2002) 324 F.3d 1095, 1102, a federal criminal case enforcing federal laws, is factually distinguishable. The court held that the combined evidence of residue that tested positive as marijuana on scissors found in the trash, evidence of hydroponics culture, and evidence linking use of the residence to other indoor marijuana growers, in addition to a statement from an informant where no information about the reliability of the informant was included, was sufficient for a search warrant. In the instant case all that was present was the untested burnt .08 grams of residue, misrepresentations regarding the lava rock and irrigation

equipment that did not accurately demonstrate hydroponic culture, black nursery pots with ambiguous implications, and a stale third hand report from an informant that was equivocal, rather than definitive. This is markedly less than what was presented in *Celestine*.

Moreover, Petitioner also fails to distinguish that the affiant in *Celestine* was a DEA agent, enforcing federal laws, which did not allow for the lawful possession or cultivation of marijuana. As set forth above, Petitioner sought his search warrant based upon an affidavit that state law was being violated, which did allow possession of some cannabis, which would have informed the decision of the magistrate in issuing the search warrant.

Thus, even if the affidavit is rehabilitated to include statements not originally contained therein, the 9th Circuit and the District Court were correct in concluding that the stale, third hand, untested informant who claimed that Dr. Baldwin was "possibly growing" cannabis at an unidentified time, and at an unidentified location, who was not accurate in describing Dr. Baldwin's car or the street that he lived on, the ambiguous presence of a lava rock (misrepresented as a "grow rock"), two common gardening pots (misrepresented as 'commonly used in indoor marijuana cultivations'), and 0.08 grams of virtually unrecognizable burnt residue and one seed, all untested, is an insufficient set of facts for a search warrant to be issued.

As the court below applied the correct standards to the facts, correctly excised the misrepresentations by Petitioner, did not leave out any truthful assertions by Petitioner in the search warrant affidavit, and correctly concluded the remaining affidavit was deficient, this Petition must be denied.

II. The Ninth Circuit did not grant undue deference to the white collar profession of Respondent, but rather assessed it as one factor in the totality of the circumstances known to the officer in the analysis required by *Michigan v. Summers*, (1981) 542 U.S. 692.

Contrary to the impression presented by Petitioner, the Ninth Circuit did not give undue deference to Respondent Michael Baldwin's profession, but rather simply included that as one fact it in the analysis of the totality of the circumstances, as required by *Michigan v. Summers*, (1981) 542 U.S. 692.

Moreover, for the first time Petitioner attempts to spin the facts to create the impression that Respondent was not a licensed dentist by making reference to his occupation as a "cover," a "veneer," and simply "secondary." This is an attempt to create the impression that Petitioner believed Respondents to be drug traffickers, which is unsupported by the record and, as the dismissal of all of the criminal charges against Respondents demonstrates, completely untrue. Respondent Baldwin was a practicing dentist, cultivating a small amount of cannabis for medical use under California law, and Petitioner sets forth no facts known or believed by Potter before the search that would lead a reasonable officer to conclude that this occupation was a sham or cover for an illicit business.

Significantly, in Petitioner's third argument, Petitioner recognizes that the officers were entering the residence of persons "suspected of cultivating and /or possessing marijuana" (Pet. Cert., page 17), and not the drug traffickers that Petitioner attempts to paint Respondents as in his second argument. This conforms to the record, that Petitioner had no

information regarding drug trafficking, which was correctly analyzed by the lower Court per *Summers*. Respondent's occupation was known to Petitioner, who possessed no other information that Respondent presented a flight risk or other danger to officers. Thus, in the lower court's analysis, the court did not grant undue deference to Respondent's profession, but simply acknowledged it as a fact admittedly known to Petitioner before the execution of the search warrant. Moreover, the Court did not misstate the rule in *Summers*, and therefore this Petition should not be granted.

III. The Ninth Circuit correctly held that Potter's conduct in executing the search warrant violated clearly established standards of excessive force

Petitioner also seeks qualified immunity for the batteries against Mrs. Chacko in executing the search warrant he authored. At the time of the entry the law has been clearly established that placing a gun to the head of a cooperating and complying female suspect, battering her by forcibly jabbing her in trachea neck 5 to 7 times, while she was wearing only a t-shirt and cottons brief and offering no resistance was excessive force (*McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005)

Contrary to assertions of Petitioner, no facts suggest now that the residence had not been secured when the batteries by use of the guns occurred. Nor were facts presented in the affidavit, or at any time after that the officers believed that the targets of the search warrant would resist or flee. In addition, contrary to Petitioner's assertion, the conduct of Petitioner did not involve "nudging" Mrs. Chacko, but rather a violent battery against her person by striking her in the trachea multiple times, and then by pressing a gun physically against her head.

Petitioner in arguing that the Court applied *McKenzie* at a too high level of generality, because the batteries in *Mckenzie* were after the suspects were handcuffed and accompanied by taunting comments, not only ignores the facts of this case, but also fails to recognize the differenced between an assault and a battery. The battery of Mrs. Chacko involving the gun occurred as she was complying with the ordered to turn around and lie down on her stomach and place her hands behind her back. A knee was also placed in her back and she was handcuffed. The facts of *McKenzie* and the present case are quite similar, given that in both cases the suspects were subdued and the batteries by use of the guns were a gratuitous escalation of force completely unnecessary under the facts of each case. Contrary to Petitioners' assertion, it is not too high a level of generality to read *Mckenzie* as providing fair notice that the gratuitous escalation of force to include battery by use of a gun physically placed against the head of a complying, non resisting suspect was excessive force.

Petitioner then applies convoluted reasoning to argue that since the officers in Robinson didn't have notice that their conduct was excessive force, even though it was, then Petitioner herein didn't have notice under *McKenzie* that his conduct was excessive force. (*Robinson v. Solano County* (9th Cir. 2002) 278 F.3d 1007) This completely ignores the long standing and critical distinction between an assault, as occurred in Robinson, and a battery accomplished by placing a gun against the head of a complying, non resisting suspect, as occurred in this case and *McKenzie*.

In addition, the additional battery committed by Potter in poking Mrs. Chacko 5 to 7 times in the neck was excessive under the circumstances, given that she was complying with the officer, was dressed in a t-shirt and cotton briefs, and Petitioner has stated no facts to suggest that such force was objectively reasonable.

Moreover, Petitioner completely fails to address his status as the author of the search warrant affidavit that contained material misrepresentations making the warrant insufficient. As that affidavit was insufficient once purged of the misstatements, and Potter knew of those misstatements, his status in the residence regarding his right to legitimately use force is implicated. Without probable cause to enter and search the residence, all of the force used by Potter is excessive. Potter's misrepresentations in procuring the warrant also implicates any claim for qualified immunity, as no reasonable officer could believe that it is acceptable to procure an illegitimate search warrant through misrepresentation that would allow that officer the legitimate right to exercise force in serving that warrant.

Assuming, arguendo, that Potter had a right to be in the residence and use legitimate force to search and detain, battering a woman dressed only in a t-shirt and underwear by striking her in the trachea repeatedly was excessive force. She offered no resistance, and as was pointed out by the Court in the decision, nothing in the search warrant affidavit or any information provided later by Potter suggests that he had any factual basis to believe that he would encounter any resistance, guns, violence, or people with criminal histories in the residence.

Since *Mckenzie* was decided in 1984, a reasonable officer should know that it has been clearly established that committing a battery by sticking a gun against the head of a complying suspect who is lying face down as instructed by the officer, who has offered no resistance, where there has been no mention of weapons in the search warrant affidavit, is excessive force.

As the court correctly analyzed Petitioner's conduct under the correct standards, this Petition should not be granted.

CONCLUSION

Wherefore, premises considered, Respondents respectfully request that the Petition for Writ of Certiorari filed by Petitioner be denied.

Respectfully submitted,

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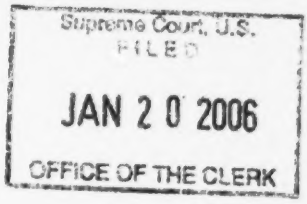

No. 05-0586

IN THE

Supreme Court of the United States

PLACER COUNTY; TRACY GRANT; RON GOODPASTER; BRIAN WIGGAM; KEVIN BESANA; STEPHEN L. D'ARCY; JEFFREY POTTER; PLACER COUNTY SHERIFF'S DEPARTMENT; REED, OFFICER,

Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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IN THE

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Petitioners,

v.

MICHAEL BALDWIN DDS AND GEORGIA CHACKO,

Respondents.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF

The Ninth Circuit and the Respondents erroneously advocate the wholesale redaction of any reference in an affidavit to marijuana found, where only the description of the marijuana, not its discovery was inaccurate. The Ninth Circuit's overbroad redaction of truthful assertions in an affidavit ignores this Court's requirement that all truthful statements be considered in an affidavit apart from the redacted facts. *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978). The accurate facts contained in the *Baldwin* affidavit are sufficient to merit the issuance of a search warrant.

Further, Respondents' reliance on *People* v. *Fein*, 4 Cal. 3d. 747 (1971), is inappropriate and distinguishable. *Fein* merely held that trace amounts of marijuana did not provide probable cause for an arrest where the arrest was a pretext to conduct a warrantless search. *Id.* at 754-55. Nothing in *Fein*, nor the enactment of California Health and Safety Code section 11362.5, invalidates Petitioner's search warrant. Finally, Respondents repeat the error of the Ninth Circuit in failing to establish that Petitioner was noticed by clearly established authorities that his conduct was excessive.

I. RESPONDENTS ARE UNABLE TO JUSTIFY THE NINTH CIRCUIT'S DEPARTURE FROM THE *FRANKS* RULE REQUIRING CONSIDERATION OF ALL TRUTHFUL STATEMENTS IN A SEARCH WARRANT AFFIDAVIT.

The Ninth Circuit erred in determining that an inaccurate description of the condition of marijuana in a search warrant affidavit requires the redaction of any reference to the existence of marijuana. This Court set forth clear guidelines in *Franks* for construing an affidavit after the "material that is the subject of the alleged falsity or reckless disregard" is "set to one side." *Franks*, 438 U.S. at 171-172. Once all the inaccurate facts are set aside, the truthful and accurate statements remaining in an affidavit cannot be disregarded. *Ibid.* Respondents seek to eliminate any reference to marijuana observed by Petitioner, despite the fact that marijuana in some condition was in fact discovered. (Opp'n to Pet. for Writ of Cert. at 7-11.)

Respondents misstate Petitioner's position as seeking to rewrite the affidavit, rather than simply considering the remaining truthful statements in the affidavit. (Opp'n to Pet. for Writ of Cert. at 7.) Even after redacting all descriptions of the form of marijuana found, the facts remaining in the

affidavit consist of the existence of marijuana in the trash, paraphernalia consistent with marijuana cultivation, and the statement of a confidential informant indicating Respondents were growing marijuana and possessed marijuana growing materials. Respondents artfully dodge the issue of whether Petitioner observed any marijuana in the trash, by instead denying "ever placing any fresh green marijuana cuttings in the trash." (Opp'n to Pet. for Writ of Cert. at 3.)

Respondents have never denied that marijuana in some form was observed in their trash. Rather, Respondent Baldwin admitted in his declaration in support of opposition to a motion for summary judgment that the marijuana discovered in the trash was originally located in his living room and the marijuana consisted of burnt, partially smoked marijuana and unsmokable marijuana stems. (Decl. Michael Baldwin Opp. To Mot. For Summ. J. ¶ 39.) The Ninth Circuit even acknowledged that ".08 grams of burnt marijuana ... are conceded [by Respondents] to have been in the trash." *Baldwin* v. *Placer County*, 418 F.3d 966, 970 (9th Cir. 2005). The Ninth Circuit again recognized Respondents' admission that marijuana was discovered, stating "according to the plaintiffs' evidence, the only marijuana in their trash searched by Potter were blackened bits of marijuana wrapped in a paper towel, the remnants of smoked marijuana." *Baldwin*, 418 F.3d at 968.

Contrary to Respondents' claim, Petitioners are not attempting to rewrite the affidavit or "add statements that were never in the warrant affidavit." (Opp'n to Pet. for Writ of Cert. at 7-8.) The discovery and identification of marijuana in the trash was included in the affidavit. At issue is the description of the marijuana. Instead of maintaining this undisputed fact in the affidavit, the Ninth Circuit misapplied *Franks* by redacting any and all reference to the discovery of marijuana and then asserted Petitioner relied on

"evidence not cited in the warrant." *Baldwin*, 418 F.3d at 971.

A misstated description of narcotics does not invalidate a warrant. In construing *Franks*, the Fourth Circuit upheld truthful assertions regarding the existence of PCP where the affidavit incorrectly described the appearance and condition of the narcotics. *U.S.* v. *Crowell*, 586 F.2d 1020, 1025 (4th Cir. 1978) citing *Franks* v. *Delaware*, 438 U.S. 154 (1978). *Crowell* held "the affidavit was not rendered deficient by proof that the affidavit erroneously stated that PCP found in the trash was in the form of white crystalline material rather than, as was the fact, in the form of brown flakes." *Ibid.* Similarly, Petitioner found marijuana, but inaccurately described its appearance and condition in his affidavit.

The discovery of even a small amount of marijuana is independently sufficient to establish probable cause for Petitioner's search warrant. *U.S.* v. *Briscoe*, 317 F.3d 906, 907-908 (8th Cir. 2003). Further, trace amounts of marijuana in combination with the other corroborating evidence establishes probable cause for Petitioner's search warrant. *U.S.* v. *Celestine*, 324 F.3d 1095, 1102 (9th Cir. 2002). Construing the affidavit in light of the existence of some form of marijuana coupled with paraphernalia consistent with marijuana cultivation and the corroborating statement of an informant, the search warrant was clearly valid. Therefore, Review is necessary to correct the Ninth Circuit's departure from *Franks*.

II. RESPONDENTS MISCONSTRUE *PEOPLE* V. *FEIN* IN ERRONEOUSLY ASSERTING THE .08 GRAMS OF PARTIALLY BURNT MARIJUANA LEAVES, A MARIJUANA SEED AND MARIJUANA STEMS COULD NOT SUPPORT PROBABLE CAUSE FOR A SEARCH WARRANT.

In challenging the probable cause for the issuance of the search warrant, Respondents misrepresent the California Supreme Court's holding in *People* v. *Fein*, *supra*, 4 Cal. 3d 747, as precluding the issuance of a search warrant where partially burnt marijuana, a marijuana seed, and marijuana stems are present. Respondents' argument that *Fein* invalidates Petitioner's warrant is specious for several reasons. (Opp'n to Pet. For Writ of Cert. at 9.)

First, *Fein* is factually distinguishable from *Baldwin* as *Fein* involved the warrantless search of a residence where the search was conducted incident to the arrest of the suspect for possession based upon the "presence of two burnt marijuana seeds." *Id.* at 755. The issue examined in *Fein* was whether or not sufficient probable cause existed to effectuate an arrest. *Fein* did not involve the issuance of a search warrant also supported by corroborating including evidence including an informant's statement and paraphernalia consistent with marijuana cultivation.

The *Fein* court noted the different standards in construing the validity of a search warrant as opposed to a warrantless arrest. 4 Cal. 3d at 752. In distinguishing these standards the *Fein* Court explained that "because 'the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . ' a greater showing of probable cause is required to justify an arrest without a warrant than to justify a search pursuant to a warrant." *Id.* at 752 (citing

People v. *Madden*, 2 Cal. 3d 1017 (1970)). Accordingly, the heightened scrutiny applied in *Fein* is inapplicable to review of the search warrant in *Baldwin*.

Secondly, *Fein* provides no guidance on the requisite quality or quantity of marijuana necessary to establish probable cause for a warrant. While acknowledging "traces or residue" of narcotics could support the issuance of a search warrant, the court held the officer should have obtained a warrant before conducting the search in order to prevent misuse of an arrest for possession as a "pretext to search for evidence." *Id.* at 755-756.

Thirdly, the portions of *Fein* relied upon by Respondents have been overturned by the California Supreme Court. In *People* v. *Palaschak*, 9 Cal. 4th 1236, 1242-1243 (1995) the court reversed itself stating, "although *Fein* and *Sullivan* reached defensible results on their facts, we disapprove the broad dictum in those cases to the effect that evidence of past possession cannot sustain a conviction for present possession." The court explained, "the additional, fortuitous fact that the defendant has consumed or ingested the drug likewise should not preclude a finding of his prior unlawful possession of it." *Ibid.* Accordingly, the evidence of marijuana possession and use discovered by Petitioner in Respondents' trash certainly supports probable cause for the issuance of a search warrant.

Finally, the Ninth Circuit has refused to apply the disapproved *Fein* standard in federal court. *U.S.* v. *Mickens*, 492 F.2d 211, 215 (9th Cir. 1973) (upholding a conspiracy charge for distribution and sales of narcotics based upon trace amounts of evidence). Moreover, the federal courts have consistently endorsed the issuance of search warrants based upon the discovery of small amounts of narcotics. *See U.S.* v. *Greany*, 929 F.2d 523, 525 (9th Cir. 1991); *Briscoe*, 317 F.3d at 907-908; *Celestine*, 324 F.3d at 1102.

In conclusion, Respondents have failed to present any reliable authority to support their contention that the presence of marijuana, even if consisting of burnt leaves, a marijuana seed, and marijuana stems, would not support the issuance of a search warrant. Notwithstanding Respondents attempt to provide possible legitimate uses for the corroborating evidence discovered, the existence of some form of marijuana in combination with paraphernalia consistent with marijuana cultivation and a corroborating statement of the informant provide ample probable cause for the issuance of a warrant. The discovery of marijuana, irrespective of its condition, coupled with the corroborating evidence would clearly lead a reasonable person to conclude there was a fair probability contraband would be found in Respondents' residence.

III. CALIFORNIA HEALTH AND SAFETY CODE SECTION 11362.5 IS IRRELEVANT TO PETITIONER'S SEARCH OF RESPONDENTS' RESIDENCE.

Respondents attempt to challenge the warrant as being in conflict with California Health and Safety Code section 11362.5 is not supported by any authorities. Citing *People* v. *Mower*, 28 Cal. 4th 457 (2002), Respondents seem to challenge the authority of the court to issue a search warrant where marijuana is found in the trash, irrespective of its condition, on the grounds, "it is possible under California law that possession and cultivation of cannabis is legal." (Opp'n to Pet. for Writ of Cert. at 10.) Notwithstanding the enactment of California Health and Safety Code section 11362.5, marijuana is still contraband under California law. Cal. Health & Safety Code § 11357. Moreover, this Court has held federal marijuana laws prevails over those of California. *Gonzales* v. *Raich*, -- U.S. --, 125 S.Ct. 2195, 2212 (2005).

Further, *Mower* was decided four (4) years after the search of Baldwin's residence and therefore is not applicable to this Petition. Additionally, *Mower* merely held a defendant who was prescribed marijuana and was charged with possession and cultivation of marijuana may bring a motion to set aside an indictment prior to trial based upon California Health and Safety Code section 11362.5. *Mower* does not support Respondents' contention that California Health and Safety Code section 11362.5 somehow precludes the issuance of a search warrant in the instant case.

Finally, *Mower* expressly recognized a prescription for marijuana must not be interpreted as immunity from arrest. Likewise, a prescription cannot grant immunity from the court's jurisdiction to issue a search warrant. In fact, *Mower* has no bearing on the inaccuracies in the affidavit, and seems to be cited only to challenge the court's jurisdiction to issue a search warrant. Even if the marijuana discovered in Respondents' trash was prescribed, such circumstances would not preclude issuance of a search warrant, nor limit Petitioner's ability to execute the warrant. *People* v. *Fisher*, 96 Cal. App. 4th 1147, 1149-1151 (2002). A prescription for marijuana does not equate to a license for unregulated and unfettered possession of marijuana. *People* v. *Trippet*, 56 Cal. App. 4th 1532, 1549 (1997). Therefore, *Mower* has no application to this Petition.

IV. RESPONDENTS ARE UNABLE TO PROVIDE ANY CONVINCING JUSTIFICATION FOR THE NINTH CIRCUIT'S ERRONEOUS HOLDING THAT PETITIONER WAS ON NOTICE HIS CONDUCT VIOLATED CLEARLY ESTABLISHED LAW.

Consistent with the Ninth Circuit's error, Respondents' are unable to articulate how *McKenzie* v. *Lamb,* 738 F.2d 1005 (9th Cir. 1984), clearly established Petitioner's conduct was excessive. As set forth in the Petition, *McKenzie* is factually distinguishable from *Baldwin*. *Baldwin* involved the placement of a weapon on the suspect's head prior to the suspect's handcuffing and the securing of the residence.

However, the circumstances in *McKenzie* transpired in the confined space of a hotel room after the suspects had been secured. The officers "pressed the barrels of their guns against appellants' heads and refused to identify themselves as police officers", and, when asked for identification, an officer "pressed the barrel of a gun between [the suspect's] eyes and replied, 'that's about all [the identification] you need.'" *McKenzie*, 738 F.2d at 1010-1011.

This Court has recognized the perils of entering an unknown home in the context of an arrest "unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.' An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." *Maryland* v. *Buie*, 494 U.S. 325, 333 (1990). The threat posed to Petitioner in executing a search warrant for narcotics in a residence is substantially similar to the threat recognized in *Buie*. Until handcuffed, Respondents posed a constant threat. Furthermore, the marijuana "grow room", as well as the rest of the residence

had not been secured. These factual distinctions are significant in that *McKenzie* fails to provide Petitioner fair notice that his actions were excessive. Therefore, Petitioner Potter is entitled to qualified immunity.

Finally, Respondents misstate the law of the Ninth Circuit declaring the existence of a "long standing and critical distinction between an assault, as occurred in Robinson, and a battery." (Opp'n to Pet. for Writ of Cert. at 14.) The majority opinion in *Robinson* v. *Solano County* refused to distinguish between an assault and battery with a weapon, whereas only the concurring opinion made such a distinction. 278 F. 3d 1007, 1017 (Fernandez, J. concurring) (9th Cir. 2002). As the majority opinion makes no distinction between assault and battery, the conduct at issue in Baldwin was not clearly established as excessive prior to the publication of the *Robinson* decision.

The law was not clearly established with regard to whether Petitioner Potter's conduct during the course of the search of Respondents' unsecured home was excessive. Therefore, Petitioner is entitled to qualified immunity.

CONCLUSION

For the foregoing reasons, Petitioner Jeffrey Potter respectfully requests this Court grant the petition and issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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